



THE UNIVERSITY *of* EDINBURGH

Edinburgh Research Explorer

Canon Law, custom and legislation

Citation for published version:

MacQueen, H 2005, Canon Law, custom and legislation: Law in the Reign of Alexander II. in RD Oram (ed.), *The Reign of Alexander II, 1214-49*. The Northern World, vol. 16, Brill, pp. 221-251.

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Peer reviewed version

Published In:

The Reign of Alexander II, 1214-49

General rights

Copyright for the publications made accessible via the Edinburgh Research Explorer is retained by the author(s) and / or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

Take down policy

The University of Edinburgh has made every reasonable effort to ensure that Edinburgh Research Explorer content complies with UK legislation. If you believe that the public display of this file breaches copyright please contact openaccess@ed.ac.uk providing details, and we will remove access to the work immediately and investigate your claim.



***Canon Law, Custom and Legislation:
Law in the Reign of Alexander II***

Hector L MacQueen *

The twelfth and thirteenth centuries were a crucially formative period in the development of law in western Europe.¹ The earlier century—characterised by one historian of law as a period of “extremely rapid, intense, and creative crisis”²—saw the recovery of the Digest of Justinian and the renewal of its study and use in teaching, first at the *studium generale* of Bologna in northern Italy, and subsequently elsewhere, at universities in the rest of Italy, southern France, Paris and Oxford. The work of the school known as the Glossators was to culminate in the thirteenth century with the *Summa Codicis* of Azo (d.1230) and the *Magna Glossa* of Accursius (d.1263), “a huge compilation of glosses or apparatus of glosses to the whole *Corpus Juris Civilis*”.³ Alongside the redevelopment of Roman or civil law marched the law of the Church, the canon law. Around 1140 the hitherto scattered canons of the Church began to be brought together by Gratian in what became the unofficial compilation entitled *Concordia discordantium canonum* but better known as the *Decretum*.⁴ This provided the platform for a major expansion of the canon law and the juristic claims of the Church. In 1234 Pope Gregory IX promulgated an official restatement of the canon law compiled by Raymond de Peñaforte (d.1240), and this came to be known as the *Liber Extra*. The scholarly

* Professor of Private Law, University of Edinburgh. As always, I am very grateful to John Cairns and David Sellar for much helpful discussion and comment.

¹ See for general surveys e.g. F Wieacker (trans T Weir), *A History of Private Law in Europe* (Oxford, 1995), chs 2-4; O F Robinson, T D Fergus and W M Gordon, *Introduction to European Legal History*, 2nd edn (London, 1994) chs 2-4; R C van Caenegem, *An Historical Introduction to Private Law* (Cambridge, 1992) ch 3; M Bellomo (trans L G Cochrane), *The Common Legal Past of Europe 1100-1800* (Washington DC, 1995), chs 3-7; S Reynolds, *Kingdoms and Communities in Western Europe 900-1300*, 2nd edn (Oxford, 1997), chs 1 and 2.; R W Southern, *Scholastic Humanism and the Unification of Europe: Volume I Foundations* (Oxford, 1995), chs 7-9.

² Bellomo, *Common Legal Past*, 33.

³ Robinson, Fergus and Gordon, *European Legal History*, 50. See further P Stein, *Roman Law in European History* (Cambridge, 1999).

⁴ What we do not know about Gratian is well discussed in J T Noonan, “Gratian slept here: the changing identity of the father of the systematic study of canon law”, *Traditio*, xxxv (1979), 145-72. See further Southern, *Scholastic Humanism*, 283-310. A Winroth, *The Making of Gratian's Decretum* (Cambridge, 2000), argues persuasively that there were two recensions of the *Decretum*, written between 1139 and 1158, the first probably by Gratian, the second (the text we know now) possibly not.

techniques which had been applied to the texts of Roman law were equally brought to bear upon the *Corpus Juris Canonici*, which also became part of the legal curriculum in the universities. In the bull *super speculam* of 1219 Pope Honorius III abolished the teaching of the secular civil law at Paris, confining legal study there to the canon law. While this was to create a division between canon and civil law of some significance for the future development of legal studies, it nevertheless remained true that “*legista sine canonibus parum valet, canonista sine legibus nihil*” (a legist [i.e. civil lawyer] without the canons is worth very little, a canonist without the civil laws nothing).⁵ The point was underlined when in 1235 Pope Gregory IX authorised the teaching of civil law at Orleans to supplement that of canon law at Paris.

The rules of the canon law were developed and applied throughout Europe by a vast machinery of courts and bureaucrats, the authority of which flowed ultimately from the Pope in Rome. This authority was manifested at the local level not only by specially authorised papal representatives but also by structures established under the bishops of the dioceses into which the lands within the sway of the Church were divided. Further, from such local decision-making machinery appeal structures led all the way to Rome itself. Canon law laid claim, not just to the internal arrangements and governance of the Church, but also to a range of matters affecting the spiritual well-being of its flock. Through its courts the Church provided the means by which its jurisdictional claims could be made good. While the precise impact of this upon medieval society varied from

⁵ The maxim was derived from *Decretum Gratiani*, Causa 7, Dictum 10. See further F Merzbacher, “Die Parömie ‘legista sine canonibus parum valet, canonista sine legibus nihil’”, *Studia Gratiana*, xiii (1967) 273-82. For the citation of classical canon law materials see J A Brundage, *Medieval Canon Law* (London, 1995), appendix 1.

place to place, there can be no doubt that the law of the Church did indeed form a universal element drawing together the legal culture of contemporary Europe.⁶

These developments of Roman and canon law would of course have their effects upon the laws and customs of the kingdom of the Scots, that “special daughter” of the Church, especially, as we shall see, in the reign of Alexander II (1214-1249). But before we move into the details of those effects, it is necessary to provide some further context for the Scottish scene. This comes from the neighbouring kingdom of England, where the twelfth century saw the massive expansion, regularisation, systematisation, and elaboration of royal justice, in particular under King Henry II (1153-1189), to become the common law of England.⁷ In the process, non-royal secular justice was, if not destroyed, reduced to a very subsidiary role indeed. The scale of the English king’s achievement was unique in Europe. Whether it was entirely the product of indigenous events, chance, or royal intent remains controversial, as does the debt which it owed to the growth of the learned laws just described.⁸ But there can be no doubt that by the time of Alexander II the English common law was a mature and articulate system. A structure of royal courts dealt constantly with the disputes of the king’s subjects across a wide range of matters, deploying a bureaucratic system of writs by which issues for decision were formulated in set words the meaning and reach of which fell to be determined by the judges. But the facts of disputes were determined by the jury, a sworn body of neighbours who would best know the truth of the matter. The rules and

⁶ See generally Brundage, *Medieval Canon Law*, passim; R H Helmholz, *The Spirit of the Classical Canon Law* (Athens, Ga., 1996); H J Berman, *Law and Revolution: the Formation of the Western Legal Tradition* (Harvard, 1983).

⁷ For a fine introductory account see J Hudson, *The Formation of the English Common Law: Law and Society in England from the Norman Conquest to Magna Carta* (London, 1996).

⁸ The controversy was stimulated by S F C Milsom, *The Legal Framework of English Feudalism* (Cambridge, 1976). For an analysis of the debate provoked by this book see H L MacQueen, *Common Law and Feudal Society in Medieval Scotland* (Edinburgh, 1993; henceforth MacQueen, *CLFS*), ch 1; the major contributions since the composition of that analysis are J G H Hudson, *Land, Law and Lordship in Anglo-Norman England* (Oxford, 1994) and P A Brand, *The Making of the Common Law* (London and Rio Grande, 1992), 203-25.

principles of the common law had been stated before the end of the twelfth century in the work known as *Glanvill*, and they were made to apply to the king himself by Magna Carta in 1215. *Glanvill* showed some influence from the learned laws, and some time during the first half of the thirteenth century a sustained effort was made to give an account of English law which would have aligned it much more clearly with Roman and canon law. But in a development of immense importance in the legal history of western Europe, the mighty work known to us as *Bracton* had no enduring effect on English law, which instead developed within an essentially insular tradition and which came robustly to reject any influence from the Continent.⁹ Indeed this attitude may be detected in incipient form as early as 1236 when the barons of England declared at Merton that they did not wish to change their laws to bring them into line with the new canonical doctrine of legitimization of children by marriage of their parents subsequent to birth.¹⁰ While of course the canon law applied as much in England as anywhere else, the inheritance of land was essentially a matter for secular law, and the legitimacy of offspring in the eyes of the Church was not to affect the decision as to who was the heir for the purposes of the common law.

When Alexander II became king of Scots in 1214, his kingdom had likewise already known a century of development and modernisation in the royal administration of law and justice.¹¹ This went alongside the processes which saw the introduction and steady expansion of tenurial structures of land-holding and the privileged trading centres known as burghs, as well as the reform of the church and substantial monastic endowment. All these had involved the establishment and settlement within Scotland of

⁹ See G E Woodbine and S E Thorne, *Bracton's De Legibus et Consuetudinibus Angliae* (4 vols, Cambridge, Mass., 1968-77). The most recent analysis is J L Barton, "The mystery of Bracton", *Journal of Legal History*, xiv (1993).

¹⁰ *English Historical Documents*, iii, no 30 (c.9).

¹¹ For what follows in the next six paragraphs, see generally MacQueen, *CLFS*, 33-50.

foreign, in particular Anglo-French, influences, and it seems certain that one reason for the visible growth of royal justice in the period was the protection of those outsiders whose investment and skills had been attracted to the kingdom. But it would be wrong to see this as indicative of a hostility or disjunction between the new and the old in the Scottish polity. It is one of the key facts of this period that the “Anglo-Norman era in Scottish history” saw rather acculturation and assimilation of the diverse elements at work in the kingdom. In particular this was true of the development of the law and custom which by the reign of Alexander’s son would be known as the common law of Scotland.¹²

Our picture of law, justice and dispute settlement in the twelfth century is however very patchy. Alongside the king’s own personal role, which is well attested, there was the creation of the office of justice or justiciar, the vice-regal powers of which must have included holding courts in the king’s name and dispensing that which his title would suggest. Long before the end of the century, there were normally two justiciars at a time, one operating in Lothian, the other in, and occasionally styled of, Scotia (Scotland north of Forth); after 1185 there may also have been a justiciar of Galloway for at least a short period.¹³ It is less clear that the sheriff, another royal officer who makes his first appearance early in the twelfth century, held courts in the localities, or that there were independent courts in the burghs; but since sheriff and burgh courts were clearly in regular operation throughout the thirteenth century, a reasonable inference would be that they had at least embryonic form before the end of the twelfth. It is probable that sheriffs and sheriffdoms were to be found throughout eastern Scotland from Berwick to

¹² On “common law” see W D H Sellar, “The common law of Scotland and the common law of England”, in R R Davies (ed), *The British Isles 1100-1500* (Edinburgh, 1988); idem, “The resilience of the Scottish common law”, in R Zimmermann and D L Carey Miller (eds), *The Civilian Tradition and Scots Law* (Berlin, 1997); MacQueen, *CLFS*, 2-3.

¹³ Barrow, *Kingdom*, 101-9.

Inverness before 1200, and that the office was the lynchpin of local royal government in those territories.¹⁴

Officers apart, however, twelfth-century royal justice does not appear highly systematic or regularised, especially in comparison with contemporary developments in England. It remained a matter of the king's *ad hoc* personal intervention, or a favour granted to particular claimants, perhaps in the king's own court (*curia regis*), rather than a matter of right or course for the king's subjects.¹⁵ Certain general ideas do emerge from the sources: for example, that the king would intervene if there was a breach of his peace and protection, or if there was a default of justice (*defectus justitiae*) by some other person. Under these concepts there seem to have developed procedures for the recovery of debts and fugitive serfs (*nativ*).¹⁶ Perhaps most significant for the future was the possibility of the king issuing an order to somebody of whom another had made complaint, "to do right so that there shall be no complaint for default of justice".¹⁷ There is also evidence that kings legislated, no doubt with the advice and assistance of their counsellors, and that the resultant "assizes" or "statutes" were intended to and did have a general effect which might extend beyond the reigns in which they were created, even though that might need reinforcement by subsequent re-enactment.¹⁸ Finally, the degree of system apparent in the basic regularity and standardisation of royal and other grants of land suggests that there were at least fairly general "norms" affecting land-holding in regard to such matters as tenure (holding land of a superior lord), categories of service rendered

¹⁴ The introduction and appendices to *Fife Ct Bk*, written by W C Dickinson, remain the indispensable starting point on the medieval sheriff.

¹⁵ See MacQueen, *CLFS*, 42-3, 47-8.

¹⁶ A Harding, "The medieval brieves of protection and the development of the common law", *Jur Rev*, xi (1966).

¹⁷ MacQueen, *CLFS*, 194-5.

¹⁸ *Ibid*, 86-8.

for such holdings (knight service, free alms and burgage), and inheritance (male primogeniture, with succession opening to females in the absence of a son).¹⁹

Perhaps the king's primary responsibility was the preservation and, where necessary, the restoration of peace in his realm. By the middle of the twelfth century there had emerged a concept of the "pleas of the crown", including the especially horrendous crimes which it was the king's right and duty to punish.²⁰ This must be seen at least partly against the background of an "honour" society in which a person wronged (or his kin, if the wrong was homicide) was obliged to seek vengeance or lose face altogether. But honour might be restored by the provision of appropriate compensation by the wrongdoer to the victim and his kin.²¹ There are signs, however, that the king, perhaps encouraged by the Church, was setting his sights against at least some aspects of both the vengeance and the compensation aspects of the honour code, as involving either an inevitable spiral of violence or the condonation of mortal sin. Thus in 1197 the magnates and prelates swore to assist King William to take *vindicta* of (i.e. punish) wrongdoers, and not themselves to take *pecunia* from them so that justice was not done.²² Another institution for the preservation of peace in which king and Church seem to have joined forces was ecclesiastical sanctuary, within which one accused of wrongdoing could take at least temporary shelter from his victim and their kin. Twelfth-century grants show that in at least some of these—for example, the Stow of Wedale, Tynninghame and

¹⁹ G W S Barrow, "The Scots charter", in H Mayr-Harting and R I Moore (eds), *Studies in Medieval History presented to R H C Davis* (London, 1985); P R Hyams, "The charter as a source for the early common law", *Journal of Legal History*, xii (1991), 179-80; MacQueen, *CLFS*, 248-9. I resist here the temptation to embark upon the debate stimulated by S Reynolds, *Fiefs and Vassals: the medieval evidence reinterpreted* (Oxford, 1994), but would observe that her conclusions deserve to be tested against the Scottish material.

²⁰ RRS, ii, no 80; APS, i, 374-5 (c.12). The list included *murdram* (secret killing), premeditated assault, rape, arson and robbery.

²¹ The classic study remains J M Wormald, "Bloodfeud, kindred and government in early modern Scotland", *Past and Present*, no 87 (1980), especially at 57-66. See also H L MacQueen, "Scots law under Alexander III", in N H Reid (ed), *Scotland in the Reign of Alexander III 1249-1286* (Edinburgh, 1990), 90-2.

²² APS, i, 377, c 20. This assize appears to be modelled upon the *edictum regium* of Hubert Walter in England in 1195 (as to which see Hudson, *English Common Law*, 138); Barrow, *Kingdom*, 111; A A M Duncan, *Scotland: The Making of the Kingdom* (Edinburgh, 1975), 201-3.

perhaps Innerleithen and Torphichen—the peace of the Church was given additional support and a wider territorial scope by that of the king, and it seems clear that this was intended to prevent feuds from escalating in further violence and bloodshed.²³

But there was no sense in which even an ambitious and assertive royal government sought a monopoly in the dispensation of justice or the declaration of law. The survival in the thirteenth and later centuries of local customary laws and offices such as the laws of Galloway, the law of Clan Macduff, the *toiseachdeor* and others is enough to show that royal justice in the twelfth century must be set against a backcloth of diversity and variety even before we begin to take into account the fast-maturing legal system of the church.²⁴ Royal grants to both secular and ecclesiastical landholders of the right to hold courts confirm the absence of a desire to claim exclusivity for the king and his officers in the administration of law, although they do suggest the currency of the idea of the king as the fount of justice in his realm, especially when his right to correct failures of justice in the grantee's court is asserted alongside the grant of jurisdiction.²⁵

Twelfth-century grants of courts frequently refer to the beneficiary's right to hold duels and ordeals in them as the means of determining where right lies in disputes coming before them.²⁶ Probably such modes of proof were exceptional, for use only in cases where no other evidence or means of resolving the dispute was available.²⁷ There are examples of decisions based upon the testimony of local people or the assertions of older persons present as to the custom in the matter, and by the end of the twelfth

²³ See H L MacQueen, "Girth: the law of sanctuary and society in Scotland", in J W Cairns and O F Robinson (eds), *Critical Studies in Ancient Law, Comparative Law and Legal History: Essays in honour of Alan Watson* (Oxford, 2001).

²⁴ See W D H Sellar, "Celtic law and Scots law: survival and integration", *Scottish Studies*, xxix (1989); H L MacQueen, "The laws of Galloway: a preliminary survey", in R D Oram and G P Stell (eds), *Galloway: Land and Lordship* (Edinburgh, 1991).

²⁵ MacQueen, *CLFS*, 35-7, 42.

²⁶ *Ibid*, 38.

century juries were in occasional use at least in the king's own court.²⁸ But nonetheless the existence and use of the *judicium Dei* demonstrate the need to avoid anachronism in talking about courts and their functions in this period. Courts were essentially gatherings of people presided over by an officer or lord who should not in any meaningful sense be compared with a modern judge. Rather than adjudication, the aim of the court seems more often to be the resolution of the dispute by negotiation and the exertion of pressure on the contending parties to settle the matter. As Anglo-French influence came to be felt in the course of the century, the gatherings that made up the court were increasingly formalised in terms of "suit of court", a duty to attend and give judgement at the lord's court which was incumbent upon his tenants and sprang from their tenurial relationship with him.²⁹ But equally older influences survived in the frequent presence in courts of the *brithemb*, Latinised as *judex*, a representative of the Gaelic element in Scottish society, and the repository of the customs by which the court might be guided in its procedures and decision-making.³⁰ The active role assumed by this officer in royal and other courts well into the thirteenth century suggests a significant role in the blending of the older customs into the newer rules which ensured that in Scotland there was nothing to parallel the cleavage of native and Anglo-French laws characteristic of later medieval Ireland and Wales.³¹

²⁷ R Bartlett, *Trial by Fire and Water: the medieval judicial ordeal* (Oxford, 1986), 26-33, 106-9, 114-6.

²⁸ MacQueen, *CLFS*, 48. Note also the deferral to the decision of the oldest *judex* in the case of the dispute between the *célidé* of Loch Leven and Sir Robert the Burgundian c.1128 (*ESC*, no 80).

²⁹ MacQueen, *CLFS*, 37.

³⁰ Barrow, *Kingdom*, 69-82.

³¹ J Bannerman, "The Scots language and the kin-based society", in D S Thomson (ed), *Gaelic and Scots in Harmony: Proceedings of the Second International Conference on the Languages of Scotland* (Glasgow, 1990); MacQueen, "Alexander III", 93-4.

We may complete this sketch of the structures of law and justice in the twelfth century with some observations about the position in the Scottish Church.³² Diocesan and parochial structures were firmly established in the course of the period.³³ A further important development in the last quarter of the twelfth century was the establishment of the independence of the *ecclesia Scoticana* (Whithorn or Galloway always excepted) from the sway of York or Canterbury. A series of Papal bulls, culminating probably around 1192 in *Cum universi*,³⁴ declared that not only was Scotland a special daughter of the Papacy, but also that disputes about the possessions of the Scottish church should be determined within the kingdom by Scots or papal appointees, unless an appeal had been made to the papal courts in Rome.³⁵

There is evidence that pre-Gratian canon law materials were known in Scotland,³⁶ and there cannot be much doubt that the *Decretum* was also in circulation there. Before the end of the twelfth century there were diocesan functionaries in Aberdeen, Glasgow and St Andrews known as “officials”, whose task was to administer the canon law in consistory courts held under episcopal authority.³⁷ Indeed, almost all the officials of whom we have knowledge before 1214 were university men, most probably in decrees.³⁸

³² See generally G Donaldson, *Scottish Church History* (Edinburgh, 1985), 40-5; S D Ollivant, *The Court of the Official in Pre-Reformation Scotland* (Edinburgh, 1982), especially at 22-7; P C Ferguson, *Medieval Papal Representatives in Scotland 1125-1286* (Edinburgh, 1998).

³³ Donaldson, *Scottish Church History*, 11-24; I B Cowan, *The Parishes of Medieval Scotland* (Edinburgh, 1967).

³⁴ See most recently A D M Barrell, “The background to *Cum universi*: Scoto-papal relations, 1159-1192”, *Innes Review*, xlv (1995).

³⁵ For comment, see H L MacQueen, “*Regiam Majestatem*, Scots law and national identity”, *SHR*, lxxiv (1995), 9.

³⁶ See *ESC* no 263 (a grant of the old priory of Loch Leven by Bishop Robert of St Andrews to the priory of St Andrews 1152x1153 “et cum his libris, id est ... exceptiones ecclesiasticarum regularum”); D Baird Smith, “Canon law”, in H McKechnie (ed), *The Sources and Literature of Scots Law*, (Edinburgh, 1936), at 187 observes that this book “may have been the *Decretum* or *Panormia* of Saint Ivo of Chartres”. For Ivo see Southern, *Scholastic Humanism*, 252-61.

³⁷ Watt, *Fasti*, 23, 187, 323.

³⁸ For Matthew and Walter, officials of Aberdeen, see Watt, *Fasti*, 23, and Watt, *Dictionary*, 1, 563; for William, official of Brechin, see Watt, *Fasti*, 56, and Watt, *Dictionary*, 582; for Matthew official of Dunkeld (possibly the same man as Matthew official of Aberdeen, above), see Watt, *Fasti*, 124, and Watt, *Dictionary*, 1, 489; for John de Huntingdon, official of Glasgow, see Watt, *Fasti*, 187, and Watt, *Dictionary*, 273 (but note that John’s predecessor, Richard de Hassendean, does not appear in the latter work); and for Ranulf

Papal judges-delegate had also begun to become familiar figures by 1200, and their use in Scotland was to become commonplace from the pontificate of Innocent III (1198-1216).³⁹ All this meant that men with knowledge and experience of the learned laws were at work as judges, pleaders and ecclesiastical administrators in Scotland by this time: an outstanding example is William Malveisin, described by a contemporary as *utriusque jurisperitus*, that is, learned in both the canon and the civil laws, bishop first of Glasgow in 1199 and then of St Andrews from 1202 until his death in 1238.⁴⁰ Malveisin's career in Scotland was to last some fifty years, with much of that time spent in the service, first of King William, and then, as we shall see further below, of King Alexander II. He also acted as a judge-delegate on at least three occasions.⁴¹ Another clerk learned in the laws whose career was to straddle the two reigns was Master Peter of Paxton (d.c.1230), who served in the household of King William's brother, Earl David of Huntingdon, from the 1180s, and who on 12 November 1219 pledged his copies of the *Digestum Novum*, *Codex*, *Infortiatum* and *Institutes*—that is, most of the core texts of Roman law—to the abbot and convent of Holyrood in security of a loan.⁴² But Master Peter's career was spent more in England than in Scotland, his Paxton being in the earldom of Huntingdon rather than the estate in Berwickshire.

The Church could also bring effective pressure to bear on the secular law and customs. The important concept of “default of justice” which underpinned at least some

de Wat and Laurence de Thornton, officials of St Andrews, see Watt, *Fasti*, 323, and Watt, *Dictionary*, 531, 576-7.

³⁹ Ferguson, *Medieval Papal Representatives*, 120-2.

⁴⁰ For his career, which was to extend into the reign of Alexander II until his death in 1238, see Watt, *Dictionary*, 374-9. See also D D R Owen, *William the Lion: Kingship and Culture 1143-1214* (East Linton, 1997), in which it is suggested that Malveisin was the Guillaume le Clerc who composed the *Roman de Fergus*. W W Scott suggests that he may have been the author of Scottish annals based on the *Melrose Chronicle*. *Chron Bower*, ix, 251-259. See also A A M Duncan, “Roger of Howden and Scotland, 1187-1201”, in B E Crawford (ed), *Church, Chronicle and Learning in medieval and early Renaissance Scotland* (Edinburgh, 1999), 145-51.

⁴¹ Ferguson, *Medieval Papal Representatives*, 128.

⁴² *Registrum Antiquissimum of the Cathedral Church of Lincoln*, ed. C W Foster and K Major, 12 vols (Lincoln Record Society, 1931-73), iii, no 821 (facsimile also on facing page); Stringer, *Earl David*, 152.

royal intervention in other courts had roots in pre-Gratian canon law.⁴³ Influence could be exercised through the activity of ecclesiastics in government: William Malveisin was the king's chancellor as well as bishop of Glasgow from 1199 to 1202, for example. Equally it might come directly from the Papacy itself. As early as 1110 x 1113 Pope Paschal II was writing to Turgot the bishop of St Andrews urging him to ensure that the laity in Scotland conformed to the canonical norms of marriage.⁴⁴ In 1200 Pope Innocent III instructed King William about the right of sanctuary afforded to those who, having committed offences, fled to churches "that, through reverence for the sacred place, they may escape the penalty they have incurred".⁴⁵ Drawing on "the prescriptions of the sacred canons and the teaching of the civil laws", Innocent laid down a series of propositions distinguishing between the position of free men and serfs, and concluded:

Do you therefore, very dear son, see to it that when in the kingdom any such case occurs you proceed according to the distinction hereinbefore drawn, that the honour and immunity of churches may be preserved intact and the occasion of evil speaking be taken away from men of a perverse disposition.

Around the same time John de Belmeis, the former archbishop of Lyons, wrote to Malveisin as bishop of Glasgow to condemn the involvement of the clergy in judicial duels or ordeals.⁴⁶ It thus seems clear that the Church sought to exercise as much of a voice in the development of secular law and custom as it had in relation to its own.

One of the issues which provoked Papal letters to the king of Scots was competition between ecclesiastical and secular jurisdiction. Early in the thirteenth century Pope Innocent III sternly rebuked King William for allowing to be decided in the king's court a case about the right of patronage in the church of Leuchars, disputed

⁴³ Helmholz, *Classical Canon Law*, 119-20, 132-4.

⁴⁴ R Somerville (ed), *Scotia Pontificia: Papal Letters to Scotland before the Pontificate of Innocent III* (Oxford, 1982), no 2. See further Duncan, *Scotland*, 130; W D H Sellar, "Marriage, divorce and concubinage in Gaelic Scotland", *Transactions of the Gaelic Society of Inverness*, li (1980), 474-5.

⁴⁵ D Patrick (ed), *Statutes of the Scottish Church 1225-1559* (Edinburgh, 1907), 205 (from the *Decretals*, book 3 title 49 c 6).

by St Andrews cathedral priory and Saer de Quinci, lord of Leuchars.⁴⁷ The papal disapproval does not seem to have prevented the successful assertion of secular jurisdiction in the case any more than it did shortly afterwards in the celebrated litigation between Melrose abbey and the earl of Dunbar over the lands of Sorrowlessfield near Earlston. Here the earl persistently refused to answer before judges-delegate the monks' complaint of his violent occupation of the lands, pleading that as the case concerned a lay tenement it ought to be heard before a secular court. The case was finally settled in King William's full court at Selkirk.⁴⁸ In both disputes the ecclesiastical argument was that when cases concerned land granted in alms, both the custom of the realm and the custom of the Scottish church gave jurisdiction to the Church courts; but the evidence of these two cases is that this claim could easily be countered with one that the lands were lay and that there was no standard procedure available comparable to the English assize *Utrum* of 1164, under which it could be determined whether land was a lay fee or held in alms.⁴⁹

With all this material in mind, let us now turn to events in the reign of Alexander II. The first point to make is the continuing personal involvement of the king himself in matters of law and the dispensation of justice.⁵⁰ One near-contemporary chronicler

⁴⁶ Ibid, 292. See further Duncan, "Roger of Howden", 146-8.

⁴⁷ T M Cooper, *Select Scottish Cases of the Thirteenth Century* (Edinburgh, 1944), 7-8; Barrow, *Kingdom*, 90; Ferguson, *Medieval Papal Representatives*, 181.

⁴⁸ Cooper, *Cases*, 9-11. See further on this case MacQueen, *CLFS*, 108, and Ferguson, *Medieval Papal Representatives*, 138-40.

⁴⁹ On the assize *Utrum*, see Hudson, *English Common Law*, 129.

⁵⁰ Note here the somewhat stereotypical comments of the later medieval chronicler Andrew Wyntoun: "This Alexander kynge of Scotlande / Was throw his lande trawalande / Haldande cowrttyis and iustrys / And chastyt in it al reweris" (*Chron Wyntoun* (Amours), v, 82, 83). Walter Bower also presents a conventional picture of the king: "supporter of orphans, protector of pupils [in the technical legal sense of boys under 14 and girls under 12], hearing the complaints of widows and the poor in person" (*Chron Bower*, v, 192). For the king's special obligations to protect orphans, pupils, widows and the poor, see MacQueen, *CLFS*, 220-1. The Roman and canon law roots of this, linked to jurisdiction *ex defectu justitiae*, are discussed in Helmholz, *Classical Canon Law*, 116-44.

observed that he was a “lover of strict law”.⁵¹ An illustration of this may be the controversy mooted in the king’s court between Helen de Burneville and Henry of Stirling concerning the former’s claim to a third (terce) of the lands which at the time of her husband’s death had been held by her now deceased mother-in-law as “*dotalicium*”. The king is recorded as wishing to have a certain rule on this matter and to have declared for law that a widow was entitled to terce not only from the lands which her husband had held at the day of his death but also from those falling to his estate *post mortem*.⁵² There are other examples of the king confirming the settlement of disputes in the *curia regis*, including a remarkable one where the authority of his court seems to have been interponed in confirmation of an amicable composition reached by Newbattle and Holyrood abbeys before papal judges-delegate.⁵³ Again, on 8 April 1235 the king and his barons were *ad colloquium* at Kirkliston when an amicable composition involving the correct interpretation of charters was reached there between Melrose abbey and Roger Avenel as to the latter’s hunting rights in the monks’ lands in Eskdale.⁵⁴

But an important development for which there seems to have been little precedent before Alexander’s time was the description of a court as *curia regis* even though the king himself does not seem to have been present, and in which instead royal officers such as the justiciar, sheriff, and chamberlain presided.⁵⁵ We have here an indication of the increasing regularisation of royal justice. There is also a greater sense of organisation in the justiciary arrangements: the justiciar of Lothian makes a first appearance under that style in 1219, and that title and that of the justiciar of Scotia

⁵¹ Anderson, *Early Sources*, ii, 559. Cf *Chron Bower*, v, 190, where the king is pictured as a “lover of equity and justice”. On the contemporary concepts of “equity” and “strict law” see Bellomo, *Common Legal Past*, 161.

⁵² *APS*, i, 401 (c.10).

⁵³ *Ibid*, 405-6, cc 2, 3; Cooper, *Cases*, 25-6.

⁵⁴ *APS*, i, 408 (c.7).

⁵⁵ MacQueen, *CLFS*, 48-9.

appear regularly in documents from then on.⁵⁶ This may have been due to the establishment of a clerk of justiciary, at least for Lothian, probably no later than the 1220s,⁵⁷ which in turn may have helped to formalise the keeping of records of the justiciars' activities.⁵⁸ The first known clerk of justiciary, Master David, probably of Braid, was a university man.⁵⁹ The sheriff and burgh courts also come into much clearer focus in Alexander's reign, and the sherifffdom system, well established in the eastern half of the country as noted earlier, was extended into the Gaelic west at Dumbarton and into Galloway following the partition of the lordship there after the death of Alan of Galloway in 1234.⁶⁰ But there does not seem to have been a justiciar of Galloway during the reign. A statute of 1245 laid down certain procedures to be followed in criminal matters by the justiciar of Lothian, "except in Galloway, which has its own special laws".⁶¹ The implication seems to be that Galloway would otherwise have fallen within the jurisdiction of Lothian for justiciary purposes.

The recognition here of Galloway's "special laws"⁶² confirms that the steady regularisation of royal justice did not necessarily entail the destruction of the local customs prevailing in the various parts of the kingdom. The reference is to the customary system for the preservation of the peace and the arrest of wrongdoers by sergeants acting under local lords, and is probably to be linked to a kin-based system of compensation payments by which amends were made for wrongdoing.⁶³ A similar system prevailed in Carrick and Lennox, where in the 1220s the earls declared that the clergy of the earldoms should not be liable to give hospitality to their sergeants (also

⁵⁶ Barrow, *Kingdom*, 104-6.

⁵⁷ Barrow, *Kingdom*, 129-30.

⁵⁸ *Arbroath Lib*, i, nos 227, 230 and 294; Barrow, *Kingdom*, 99, 117.

⁵⁹ Watt, *Dictionary*, 61.

⁶⁰ See further below, 000.

⁶¹ *APS*, i, 403 (c.14).

⁶² The phrase has overtones of *jus proprium*, as distinct from the *jus commune* of the kingdom.

⁶³ MacQueen, "Laws of Galloway", *passim*.

known as *kethres*, according to the source).⁶⁴ But Galloway was also the scene of suppression of local custom. The partition of the lordship in 1234, which has already been mentioned, was the outcome of an imposition of the Anglo-French rules of succession under which daughters could inherit in the absence of legitimate sons, with division taking place amongst them if there was more than one. But Alan lord of Galloway did leave a son, Thomas, who was illegitimate in the eyes of the canon law and therefore ineligible to inherit under the general law, but whose claim to become his father's successor in the lordship was recognised by the chiefs and men of the clans of Galloway. Their rising in support of Thomas' claim was swiftly crushed in 1235, but the issue, like the long-lived Thomas himself, had still sufficient vigour towards the end of the thirteenth century to be a matter of concern to King Alexander III on the day before his death in 1286, as well as subsequently to the conquering King Edward I of England.⁶⁵

There is also a good deal of evidence for the continuing vigour of lords' courts between 1214 and 1249. For present purposes, the most important observation about these courts is that they continued to be places in which the tenurial relationship between lord and tenant could be worked out, through such processes as the granting and resignation of a holding, disciplinary procedures concerning the tenant's failure to perform the services owed to the lord for his lands, or disputes about who was entitled to hold the lands. An example of the last can be found in the 1220s, when Patrick of Naughton quitclaimed the lands of Moncreiffe to David de Munehtes and his heir in perpetuity in the court of Philip de Moubray.⁶⁶ The interaction of these courts with the outside world can however be seen in the presence at this case of the king's chancellor, a

⁶⁴ *Glasgow Reg.* i, nos 139, 141.

⁶⁵ Duncan, *Scotland*, 530-1; G W S Barrow, *Robert Bruce and the community of the realm of Scotland*, 3rd edn (Edinburgh, 1988), 5-6, 112.

⁶⁶ *Moncreiffs*, ii, appendix no II.

cleric named Master Matthew (who was therefore a university man).⁶⁷ Also present was Bredi Portanache, then *judex*, most likely of Strathearn, perhaps an illustration of the importance of such officers as links between the older customs and the Anglo-French and canon law influences also at work. Another interesting instance where we can see the lord's court interacting with the king's c.1225 is in a charter of Alan of Galloway as lord of Cunningham where he confirms Hugh of Crawford in the third part of the town of Stevenston which had been sold to him by Margaret daughter of Adam Loccard. Margaret had quitclaimed the lands and rendered them to Hugh in Alan's court, but for greater security she also quitclaimed Hugh in the king's court.⁶⁸ This document "surely hints at the potential inability of Alan's court on its own to sustain Hugh's title. It may not have been Alan who was being forestalled here so much as some possible claimant in the king's court who would be able to undo what had happened in Alan's court."⁶⁹

Developments in the world of secular law and custom went alongside the continued growth of ecclesiastical jurisdiction. Officials can be found in virtually every Scottish diocese in the period, and on the whole they continued to be university men, presumably having studied decreets.⁷⁰ There was also a considerable growth in the use of papal judges-delegate. Nearly half of the 158 cases identified by Dr Paul Ferguson as having taken place before judges delegate between 1165 and 1286 occurred in the reign

⁶⁷ For Master Matthew the Scot, see Watt, *Dictionary*, 489-90; he was probably a graduate of Paris in Arts and Theology, but may just possibly be identified with Master Matthew of Aberdeen who was official of Dunkeld 1203 x 1210 (*ibid*, 1).

⁶⁸ Printed as an appendix to Stringer, "Periphery and core in thirteenth-century Scotland: Alan son of Roland, lord of Galloway and constable of Scotland", in A Grant and K J Stringer (eds), *Medieval Scotland: Crown, Lordship and Community* (Edinburgh, 1993), 110-11.

⁶⁹ MacQueen, *CLFS*, 45.

⁷⁰ For Richard and "W." officials of Aberdeen see Watt, *Fasti*, 23, and Watt, *Dictionary*, 468-9 and 561-2; for Daniel and Maurice, officials of Argyll, Watt, *Fasti*, 38; for Henry de Norham official of Brechin, Watt, *Fasti*, 56, and Watt, *Dictionary*, 430; for Durand and Geoffrey, officials of Galloway, Watt, *Fasti*, 140; for Richard de Ancrum official of Glasgow, Watt, *Fasti*, 187; for "M." and "J.", officials of the Isles, Watt, *Fasti*, 212; for William Agnus official of Moray, Watt, *Fasti*, 244, and Watt, *Dictionary*, 3; for Walter de Mortimer and Andrew de Aberdeen officials of St Andrews, Watt, *Fasti*, 323, and Watt, *Dictionary*, 1, 419-20; and for Alexander de St Martin official of Lothian Watt, *Fasti*, 327, and Watt, *Dictionary*, 478. It is

of Alexander II.⁷¹ Many if not all of these judges-delegate must have been, like the ones who decided the great dispute over the lands of Monachkenneran in 1233 “wise men learned in both the canon and the civil laws”.⁷² A striking example may be Master Laurence of Thornton, “the single most frequent judge-delegate of the period [1209-1238x1240]”, and also official of St Andrews diocese between 1203 and 1224 as well as a close associate of Bishop Malveisin.⁷³

The increasing role of judges-delegate during Alexander II's reign must have been apparent to contemporaries. This may be evident in the increasing number of clashes between the ecclesiastical and secular jurisdictions, especially where a dispute over land broke out between a layman and the Church in some shape or form. Like his father before him, King Alexander received papal letters reproaching him for allowing suits about land held in free alms to come before secular tribunals.⁷⁴ An apparent innovation of his administration was a form of royal prohibition by which litigation in an ecclesiastical forum could be halted by the claim that the matter was secular. An early example is the case between Robert Hood and the bishop of Moray over the lands of Llanbryde in 1225, which began before judges-delegate but was prohibited by the king, “asserting that the aforesaid manor was his barony and that therefore it should take place in the royal and not an ecclesiastical court”.⁷⁵ The royal letters or brieves which were used for this purpose probably took more or less the form found in the later “registers” of brieves, under which the Church court was prohibited from proceeding in cases of lay tenements.⁷⁶ Their effectiveness is suggested by the precaution which churchmen seem

worthy of mention that the officials of Argyll, Galloway and the Isles are not known to have been university men.

⁷¹ See Ferguson, *Medieval Papal Representatives*, Appendix I.

⁷² *Paisley Reg.*, 169.

⁷³ Ferguson, *Medieval Papal Representatives*, 129; Watt, *Fasti*, 323; idem, *Dictionary*, 531.

⁷⁴ *Scone Lib.*, no 120. See also *Glasgow Reg.*, i, nos 158, 161; Ferguson, *Medieval Papal Representatives*, 187.

⁷⁵ *Moray Reg.*, appendix, 459 (no 6).

⁷⁶ *Reg Brieves*, 46 (no 64), 55 (nos 23-7); *Formulary E*, nos 4-7.

to have started to take, by obtaining from their opponents in litigation a renunciation of the king's letters of prohibition.⁷⁷

But the picture of conflict between church and state should not be over-dramatised. As Dr Ferguson has pointed out, churchmen were frequently able to make claims to land against laymen successfully before judges delegate, while laymen often made claims against the Church in the same forum.⁷⁸ Dr Ferguson concludes with appropriate caution:⁷⁹

The picture which seems to emerge here is one of occasional instances in which powerful laymen were able to defeat or delay their ecclesiastical opponents and to force them into the secular forum. Secular jurisdiction was also invoked when the subject of the suit was of particular interest to the Crown ... Where lesser men were defenders, and where such interests were not involved, the jurisdiction of papal judges-delegate seems seldom to have been challenged by secular jurisdiction. As Duncan notes, however, a firm conclusion on this issue will require a comprehensive study not only of the cases before judges-delegate but also of the many compositions which may have resulted from litigation in the secular forum.

The jurisdiction of the canon law in the affairs of the laity seems to have won acceptance in questions of status, marriage and legitimacy.⁸⁰ At the very end of King Alexander's reign and at the beginning of that of his successor, Alwin of Callendar and John of Kinross, both laymen, were litigating before papal judges-delegate over John's claim that Alwin was illegitimate and therefore not entitled to inherit certain lands which would otherwise fall to John.⁸¹ The case nicely illustrates the interaction between the ecclesiastical and the secular in matters of law and litigation. Since the lands in question were unquestionably a lay tenement, a judgement in John's favour on the legitimacy point would not have concluded the process of recovering the lands. He would have had to go off to the secular courts for that purpose. But at the same time the substance of the

⁷⁷ MacQueen, *CLFS*, 110.

⁷⁸ See Ferguson, *Medieval Papal Representatives*, 140-1, 181-2, 187-9.

⁷⁹ *Ibid*, 189.

⁸⁰ *Ibid*, 157-9.

⁸¹ Cooper, *Cases*, 61-5; Ferguson, *Medieval Papal Representatives*, 158-9.

canonical rules on marriage and legitimacy was crucial to the secular rules on inheritance of land. As we have seen with the dispute about the succession in Galloway in 1234, one dubbed illegitimate by the canon law would be excluded from any claim to inherit.

Major developments took place in the general canon law itself during the reign of Alexander II. Apart from the promulgation of the *Liber Extra* in 1234, already mentioned, in November 1215 there took place in Rome under Pope Innocent III the Fourth Lateran Council, which ushered in a large number of major reforms, including, most significantly for our purposes, a prohibition upon clerical participation in the ordeal.⁸² Although the Council was attended by three Scottish bishops, including William Malveisin, and by Henry abbot of Kelso,⁸³ there were problems in administering its reforms in Scotland through the lack of a metropolitan archbishop. This led to the establishment by Pope Honorius III of the Provincial Council of the Scottish Church in 1225.⁸⁴ This was not only the deliberative body of the Scottish Church, but also both a legislative and a judicial body. Donald Watt observes in his account of the Provincial Council:⁸⁵

Provincial councils everywhere after the Fourth Lateran Council were charged with reform of ‘mores’, meaning presumably prevailing customs of all kinds. In Scotland, as elsewhere, a consequence was that the decades after 1215 saw local church leaders compiling collections of statutes for approval at both diocesan and provincial levels. ... [T]he bulk of the Scottish provincial statutes is concerned with defining matters of local custom, rather than with emphasising the universal law of the Church. ... Whatever a pope like Innocent III might think, the *Corpus [Juris Canonici]* was no monolithic code of law ready to be enforced everywhere throughout the Church: it was a quarry from which church lawyers were constantly excavating rules which they claimed to be the law of the Church, but which were interpreted in widely divergent ways by different schools of lawyers.

⁸² For a translation of the decrees of the Council, see *English Historical Documents*, iii, 643-76. The abolition of clerical participation in the ordeal is c 18 (*ibid*, 654). On the Council see J Sayers, *Innocent III: Leader of Europe 1198-1216* (London and New York, 1994), 95-101, 114-15.

⁸³ Anderson, *Early Sources*, ii, 405.

⁸⁴ *Statutes of the Scottish Church*, 1.

⁸⁵ D E R Watt, “The Provincial Council of the Scottish Church 1215-1472”, in Grant and Stringer (eds), *Medieval Scotland*, 147, 151.

The Provincial Council was not the only body to issue legislation between 1214 and 1249. Perhaps the single most significant piece of legal material surviving from the reign of Alexander II is his statutes, which undoubtedly embody and reflect extremely important steps in the creation of the Scottish common law. They appear in particular to give a new prominence to the jury as an instrument of justice in both civil and criminal matters, to reduce dependence on the duel and the ordeal, and, finally, to be the occasion of the introduction of the pleadable *briefe of dissasine* or *novel dissasine*, modelled on the crucially important English common law writ of *novel disseisin*.

The attribution of the statutes to Alexander II is not without problems. In the earliest manuscript, the fourteenth-century Ayr MS, they are placed amongst the assizes of David I, and this tradition ran on until the sixteenth century. But a separate tradition, of which the late fourteenth- or early fifteenth-century Bute MS appears to be the earliest example, assigns them to “Alexander son of king William”, along with dates and, in some later manuscripts, the personnel present when the statutes were enacted.⁸⁶ Thus we are told that the most important group of statutes was passed at Stirling on the Sunday before the feast of St Luke the Evangelist in 1230 (13 October), in the presence of the king, the bishop of St Andrews (William Malveisin), Malcolm earl of Fife, William Comyn earl of Buchan and justiciar of Scotia, Thomas Melsanby prior of Coldingham, Walter Olifard justiciar of Lothian, Walter fitz Alan steward of Scotland, John Maxwell and many others. In February 1245 a larger group of bishops, abbots, earls and others gave their consent and assent to further statutes of the king, while in May 1249 another

⁸⁶ The general pattern of attribution is clear from the “Notice of the Manuscripts” and “Table of Authorities” in *APS*, i, 175-210 and 224-5 respectively. In the important British Library Additional MS 18111, not known to the editors of *APS*, the 1230 statutes are included amongst the *Assise Regis David* (f 130r). It is worthy of note that the earliest MSS in which there appears the group of names mentioned as present in 1230 are written in Scots rather than Latin, i.e. NLS Adv MS 25.4.15 (ff 89v, 106r) and Adv (Cokburn) MS 25.4.14 (f 94v), both of late 15th-century date. Could they be translations of sources from which previous copyists had omitted material thought to be of no practical importance? I am grateful to

group of magnates and prelates which included the justiciars of Scotia and Lothian met at Stirling to witness the king's enactment of a statute. While as they stand in the surviving manuscripts these attributions are not contemporary, it is difficult to imagine that a later medieval scribe could have invented what are undoubtedly lists of some of the most prominent of the king's counsellors at the relevant times. This tends to support the basic authenticity of the transmission of the texts from whatever form was taken by the originals into the copies and translations made by and for later medieval lawyers, although we cannot be sure that the exact wording of the originals has come down to us.

The deployment of the jury, and the downplaying of the duel and the ordeal, in these statutes has taken on significance mainly as the Scottish response to the abolition of clerical participation in the ordeal by the Church at the Fourth Lateran Council in 1215. Robert Bartlett has shown how this withdrawal of ecclesiastical support undermined the credibility of the ordeal as the judgement of God, and therefore presented a major crisis for the secular systems of justice throughout Europe.⁸⁷ It seems clear that the need for alternative systems of proof which was universally felt in the difficult cases in which the ordeal had previously been available must also have been applicable in Scotland. Ian Willock has rightly cautioned against seeing the statute of 1230 as representing the definitive abolition of the ordeal in Scotland and its replacement with the jury (here described as a *visnet*) as a mode of proof, since in terms it is confined to cases of theft and robbery.⁸⁸ Similarly, the statute which requires the use of a local group of persons (i.e. a jury) to consider the complaints of those "who ought not to fight" must be seen as a specific solution in a particular context - the loss and recovery of

Dr David Fergus of Glasgow University for giving me access to his microfilm collection of "auld lawes" MSS to assist in my pursuit of this question.

⁸⁷ See Bartlett, *Trial by Fire and Water*.

⁸⁸ *APS*, i, 400 (c.6); I D Willock, *The Origins and Development of the Jury in Scotland* (Edinburgh, 1966), 23-8. For an example of an ordeal exculpating one guilty of rape narrated in a mid-thirteenth-century text, see R

moveable property - rather than an attempt to abolish the duel in all cases.⁸⁹ But nonetheless the statute does reflect the influence brought to bear on the secular law by ecclesiastical pressure, personified at Stirling by Bishop Malveisin in particular. He had attended the Lateran Council and had already been a no doubt willing recipient and disseminator of correspondence from other ecclesiastics railing against the judicial duel.⁹⁰ It was probably Malveisin again who, having remained in Rome after the Lateran Council,⁹¹ had procured from Pope Innocent III in 1216 a bull specifically condemning the “baneful custom” in Scotland by which the clergy could be compelled to undergo judicial duels.⁹² Prominent amongst the persons who under the 1230 statute were not to fight duels were men of religion, clerks and prebendaries;⁹³ and this probably had some effect, to judge from two brieves of protection issued by the king in 1232, taking the monks of Melrose and Balmerino respectively under royal protection and instructing all his sheriffs to treat the causes of the monks as though they were the king’s own, including finding a champion (*pugnatores*) for them if need be.⁹⁴

As this evidence confirms, however, the duel continued to play a part in the administration of the law after 1230—indeed for some centuries after 1230.⁹⁵ In 1242 Walter Bisset was accused of the killing of Patrick of Atholl. He offered to clear himself by duel or compurgation, while his accusers demanded that the accusation be put to a jury. The issue seems never to have been resolved by formal process and Walter, having

Bartlett (ed), *The Miracles of St Æbbe of Coldingham and St Margaret of Scotland* (Oxford, 2003), 118-9 (on the dating of the text see *ibid*, xxxiv-vii, xlix).

⁸⁹ *APS*, i, 399 (c.5).

⁹⁰ See above, 000.

⁹¹ See Anderson, *Early Sources*, ii, 405, 431.

⁹² *Statutes of the Scottish Church*, 293.

⁹³ *APS*, i, 399 (c.5).

⁹⁴ *Melrose Liber* no 175; *SHS Misc*, viii, 8-9.

⁹⁵ The *locus classicus* for Scotland remains G Neilson, *Trial by Combat* (Glasgow, 1890). See further W D H Sellar, “Courtesy, battle and the brieve of right 1368—a story continued”, in *Stair Society Miscellany II* (Edinburgh, 1984); MacQueen, *CLFS*, 197-9.

put himself in the king's mercy, abjured the realm.⁹⁶ The story demonstrates how far the jury still was from displacing the duel, and it may also be part of the background to further legislation in 1245,⁹⁷ when it was provided that the justiciar of Lothian should hold an inquest to identify wrongdoers within his jurisdiction since Christmas 1243. Those identified were to be arrested and brought before the justiciar and a faithful *visnet*, which would determine whether they were guilty of "*murthra*" (probably meaning secret killing, unseen by witnesses, as had happened in the slaying of Patrick of Atholl), robbery or similar felonies pertaining to the king's crown. If so, all their goods would be forfeit to the king. But conviction of such lesser crimes as theft or homicide (i.e. killing other than *murthra*⁹⁸) would lead to forfeiture to their lord. The procedure of indictment by inquest and trial before the justiciar was to continue in future, but all those convicted of theft or homicide would be handed over to their lords to have justice carried out without any redemption save by the grace of the king.

The continuing role of lords' courts in the punishment of crime suggests a certain continuity from one of the earlier statutes of 1230 which had restricted the power of lords to repledge wrongdoers to their own courts to certain cases only, i.e. where the accused was the lord's liege man, serf, dweller on his lands or a member of his *familia*. This question was to be determined by lawful men of the country.⁹⁹ Both acts therefore interposed a process of inquiry by inquest before proceedings might be carried forward in whatever was the appropriate forum.

⁹⁶ Duncan, *Scotland*, 543-6.

⁹⁷ *APS*, i, 403-4, (c.14).

⁹⁸ The statute is an interesting indication that the distinctions of homicide which would later crystallise as killing by forethought felony or upon a suddeny were already present in the criminal law. See further W D H Sellar, "Forethocht felony, malice aforethought and the classification of homicide", in W M Gordon and T D Fergus (eds), *Legal History in the Making* (London and Ronceverte, 1991).

⁹⁹ *APS*, i, 399 (c.4).

As Geoffrey Barrow has observed, the procedure introduced in 1245 is highly reminiscent of the jury of presentment introduced in England by the Assize of Clarendon in 1166.¹⁰⁰ But the influence of canonical criminal procedure must also be taken into account. From early in the thirteenth century, and in particular after the Lateran Council in 1215, the Church was developing the accusatory process of the inquisition, “so-called”, writes James Brundage,¹⁰¹

because it was conceived of as an investigatory process initiated by public authorities, such as judges, who operated through inquiry (*per inquisitionem*) into wrongdoing that was a matter of common knowledge or grave suspicion (*notorium, manifesta* and *fama* were the terms generally used to describe such affairs).

The process was concerned with the “occult crimes”, such as heresy, which did not lend themselves to ready or decisive proof; and it is striking that the inquest established by the Scottish statute of 1245 was to concern itself with secret killings and robberies, violent crimes to which the only witness apart from the perpetrators might well be the victim. A combination with direct English influence seems quite probable, however, since in a final provision of the 1245 statute, any knight indicted by the inquest was to have a *visnet* of other knights or freeholders of heritage. This principle of “trial by peers”, found in Magna Carta (cc 21, 39, 59), was to be repeated in the last known legislation of the reign, at Stirling in May 1248.¹⁰²

The awareness of English law and procedures which is thus apparent in the 1245 statute is even more clear in the 1230 legislation introducing a procedure to remedy

¹⁰⁰ Barrow, *Kingdom*, 112.

¹⁰¹ *Medieval Canon Law*, 94-5.

dissasine. As already noted, the model here was the famous assize of novel disseisin, invented in England in the 1160s (after “many wakeful nights”, according to *Bracton*¹⁰³). The English writ enabled a plaintiff to bring before the king’s justices his complaint that the defendant had disseised him of his free tenement unjustly and without a judgment, and to have the issue determined by a recognition of twelve men of the neighbourhood in which the lands lay. Restoration would follow a verdict in the plaintiff’s favour. The influence of this writ can be best seen from the words of the 1230 statute itself:¹⁰⁴

The lord king Alexander also enacted at the said day and place that if anyone should complain to the lord king or his justiciar that his lord or any other person has dissaised him unjustly and without a judgment of any tenement of which he was previously vest and saised, and shall find pledges for the pursuit of his claim, the justiciar or the sheriff by precept of the king or the justiciar shall cause it to be recognosced by good men of the country if the complainer makes a just complaint. And if it shall be recognosced and proved, the justiciar or the sheriff shall cause him to be resaised of the land of which he was dissaised, and the dissaisor shall be in the king’s mercy. If however it shall be recognosced that the complainer has made an unjust complaint, the complainer shall be in the king’s mercy of ten pounds.

What is the significance of this statute? It fits in with the general pattern of the 1230 legislation in making available a standard procedure under which the issue in dispute would be resolved by a jury rather than by other means. Although we lack direct evidence on the subject, it seems probable that before 1230 a dispute about who should hold a piece of land outside a burgh would generally have been resolved by a duel if it could not be settled by negotiation.¹⁰⁵ The new action was also a crucial step towards the conversion of royal justice into a common law of the kingdom. The statute was laying down a procedure to be automatically available to a complainer before the king or the justiciar. It could be invoked by obtaining a “precept of the lord king”, that is, a royal breve. We know from later evidence that this breve was in a standard form, the

¹⁰² *APS*, i, 404 (c.15). See further J C Holt, *Magna Carta*, 2nd edn (Cambridge, 1992). For possible influence from the learned laws see R H Helmholz, “Magna Carta and the *ius commune*”, *University of Chicago Law Review*, lxxvi (1999), especially at 326-9.

¹⁰³ *Bracton*, iii, 25. See generally, in addition to literature cited above at note 00, D W Sutherland, *The Assize of Novel Disseisin* (Oxford, 1973).

¹⁰⁴ *APS*, i, 400 (c.7).

wording of which came very close to that of the original statute. Royal justice here was therefore no longer a favour or an *ad hoc* intervention; it was a matter of course or of right for the complainer.

The participants at Stirling in 1230 must also have had a very clear idea of the significance of the step they were taking. The assize of novel disseisin had been at the very heart of the development of the English common law, and remained one of the most popular forms of action before the king's justices. Of the known actors at Stirling, perhaps the most significant here were the two justiciars, Walter Olifard of Lothian and William Comyn of Scotia. In 1230 each had held office for a very long time: Walter since 1215 and William for an even greater period, since 1205; they must have brought to the deliberations extensive experience of the problems actually encountered in court. Both men also belonged to the important group of the Scottish nobility who held lands in England as well as Scotland;¹⁰⁶ they would therefore have been at least aware of the procedures used in the English royal courts.

What were the factors which led the gathering at Stirling to take the step of introducing an action for dissasine? The statute's reference to dissasine by the complainer's "lord or any other person" suggests the possible relevance of a debate amongst English legal historians as to the origins of novel disseisin. Was the assize originally simply a means of regulating the lord's power to discipline tenants who failed to perform the services owed for their land by ejecting them from their tenement? This would explain, amongst other things, the requirement that the disseisin be "unjust and

¹⁰⁵ MacQueen, *CLFS*, 37-9, 198-200.

¹⁰⁶ A Young, *Robert the Bruce's Rivals: The Comyns 1212-1314* (East Linton, 1997), 15-16, 19-28; K J Stringer, *Earl David of Huntingdon: a study in Anglo-Scottish History* (Edinburgh, 1985), 159.

without a judgment”; a just judgment of the lord’s court was necessary before a tenant could be expelled from his holding.¹⁰⁷

But while this view has offered a powerful insight into a world in which disseisin could happen otherwise than through casual, almost anarchic violence, and links in an important way with the principle that the king would remedy defects of justice in the courts of others, it has not gained acceptance as the sole explanation for the development of the action. In support of this conclusion, it may be noted, the Scottish statute does not see lords as the only dissaisors against whom redress might be sought. Another potential source of disseisin which emerges from the English evidence was the Church, enforcing its rights to land, not as a feudal lord, but under the canon law rules which required bishops to recover land unjustly alienated by their predecessors. Could novel disseisin have been the means by which laymen who had acquired land from the Church were enabled to resist the processes of the canon law?¹⁰⁸ Did the problem extend further, as our earlier discussion of the clashes between ecclesiastical and secular jurisdiction in cases about land may suggest, to the expulsion of laymen from their holdings following litigation before judges-delegate?

I have suggested elsewhere that a dispute which was ongoing around 1230 before Walter Olifard as justiciar of Lothian may have been a specific trigger for legislative action in Scotland.¹⁰⁹ The case was between Patrick, son of the earl of Dunbar, and the priory of Coldingham. Patrick was said to be unjustly occupying the priory’s lands of Swinewood in Berwickshire. The whole matter was eventually settled in Walter’s

¹⁰⁷ The argument begins with Milsom, *Legal Framework of English Feudalism*, 1-35; see now Hudson, *English Common Law*, 193-8.

¹⁰⁸ M Cheney, “The litigation between John Marshal and Archbishop Thomas Becket in 1164: a pointer to the origins of novel disseisin?”, in J A Guy and H G Beale (eds), *Law and Social Change in British History* (London, 1984).

¹⁰⁹ Raine, *North Durham*, no 126; MacQueen, *CLFS*, 142-3.

justiciary court at Roxburgh in 1231, when Patrick renounced his claim and acknowledged the *plenum ius* of the priory to the lands. Was this settlement obtained because the priory now had to hand a royal remedy by which its claim could be made good? It may be significant that Thomas Melsanby, prior of Coldingham, was another who was present at Stirling in October 1230 to assent to the passage of the statute on dissasine. But if there was a connection between this case and the statute, then it is worth noting that there does not appear to have been any tenurial relationship between Patrick and the priory, and that in this case it was the ecclesiastical organisation which successfully resisted the claims of the layman, even in the secular court.

Discussion of the background to the introduction of the brieve of dissasine should also take account of the introduction of another pleadable brieve, that of mortancestry. There are grounds for supposing that this brieve, which was also modelled on one of the key writs of the early English common law, the assize of *mort d'ancestor*, was introduced to Scotland before 1237, making it another innovation of Alexander II.¹¹⁰ Certainly it was in use not long after the king's death, when in 1253 Emma of Smeaton raised an action against Dunfermline abbey by royal letters of that name.¹¹¹ Procedure under the brieve was similar to that for dissasine: generally it took place before the justiciar, and a jury or recognition was always used to determine the facts of the dispute. The brieve enabled a claimant to recover lands from the defender currently holding them by showing that he was entitled to inherit from one of a limited number of relatives. Thus, whereas dissasine protected security of possession, mortancestry protected security of inheritance.¹¹² Again it has been suggested that the primary purpose of the English

¹¹⁰ Ibid, 169-70.

¹¹¹ *Dunfermline Reg.* nos 82-3.

¹¹² It is by no means impossible that the legally-minded clergy present at Stirling in 1230, such as William Malveisin, saw the new remedy for dissasine as a possessory one, to be distinguished from other, petitory or proprietary ones. For the canonical and ultimately Romanist distinction between proprietary and possessory claims being used in Scotland before 1230, see *Statutes of the Scottish Church*, 199 (letter from

action was to compel lords to enter the heirs of their deceased tenants and to limit their discretion when tenements held of them fell vacant through death of the incumbent.¹¹³ This view has not commanded universal support, but no convincing or plausible alternative has since been put forward.

There are a number of cases in Scotland in the 1230s and 1240s in which actions for the recovery of land were begun by royal breve before the justiciar or the sheriff, many of them seeming to involve a “recognition”, that is, a jury or assize. They may therefore be cases of either dissasine or mortancestry.¹¹⁴ Many of these do appear to involve disputes between lords and tenants, and in several of these the lord was the priory of Coldingham. Thus between 1233 and 1235 Eda, Maria and William of Paxton sought to exercise a right of estovers in the priory’s wood at Restonside “by the lord king’s breve of recognition addressed to Sir William Lindsay then sheriff of Berwick”.¹¹⁵ At the time the priory claimed to be the superiors of Paxton. Probably not long after, the priory was defending another action begun against it by one of its tenants “by the lord king’s breve of recognition”, this time addressed to the justiciar of Lothian. The tenant, Mariota of Chirnside, and her son Patrick were claiming one ploughgate at Renton, which was held of the priory.¹¹⁶ In 1247 Adam Spott impleaded Ranulf of Buncle “by precepts of the lord king” for certain lands in the defender’s lordship of Buncle, the action beginning in the sheriff court of Berwick but ultimately being settled before the justiciar of Lothian.¹¹⁷ Probably around 1250 another Mariota, daughter of Samuel, raised an action about the lands of Stobo by royal letters in the sheriff court at

Pope Innocent III to inter alia the bishop of St Andrews (Malveisin?), and Master Laurence the official of St Andrews), and *Moray Reg*, nos 73-4 (judges-delegate in 1226 grant possession of lands of Rhynie to bishop of Moray while expressly reserving the question of property).

¹¹³ Milsom, *Legal Framework*, 154-76; Hudson, *English Common Law*, 198-201.

¹¹⁴ See further MacQueen, *CLFS*, 138-41, 170-1.

¹¹⁵ Printed and commented upon in *Journal of Legal History*, iv (1983), 48*.

¹¹⁶ Raine, *North Durham*, no 378.

¹¹⁷ Fraser, *Douglas*, iii, no 285.

Traquair.¹¹⁸ The defender in the action, the bishop of Glasgow, was the superior of Stobo, and, like the Paxton case, the substance of the action was probably rights in common claimed by the tenants in the superior's land.

In 1235 Gilbert son of Samuel impleaded Maeldomhnaich earl of Lennox before the justiciar of Scotia for the lands of Monachkenneran, having raised his action "by letters of the lord king".¹¹⁹ This case involves a mixture of ecclesiastical and secular processes which may show how scenarios of dissasine could arise. Monachkenneran pertained to the church of Kilpatrick which the earl had subinfeudated to Paisley abbey. The rector of Kilpatrick was the earl's younger brother Dougal, who had alienated the lands to Gilbert in a transaction which the earl had then confirmed. Enforcing the canon law rules against unjust alienation of church lands, the abbey recovered Monachkenneran by action before papal judges-delegate in 1233, but Gilbert remained contumaciously absent from the proceedings, meaning that the secular arm had to be brought in to enforce the judgment. It was possibly at this stage that the earl had to eject Gilbert, going against the earlier confirmation, and the latter's reaction was perhaps to bring a brieve of dissasine. In any event he obtained sixty silver marks from the earl in settlement of the claim.¹²⁰

This and the other cases mentioned above suggest that the exercise of lordship in land, claims to common rights, and the sometimes competing processes of canon and secular law do lie behind the situations in which we can see actions being raised by brieve in the royal courts. The most probable explanation for the introduction of the brieve of dissasine in 1230, and its partner the brieve of mortancestry shortly afterwards, ought

¹¹⁸ *Glasgow Reg*, nos 130, 131, 172.

¹¹⁹ *Paisley Reg*, 170.

¹²⁰ See further on the Monachkenneran dispute Cooper, *Cases*, 33-40.

therefore to take account of all these factors, as well as a royal interest, drawing upon the long-established duty of the king to hold the peace and prevent defaults of justice, in protecting security of both tenure and inheritance in relation to land. The involvement of women as pursuers in many of the cases may also be important: were they struggling to ensure rights of inheritance and terce against reluctant lords and heirs? Finally, many of the cases are about quite small areas of ground and involve claimants who can at best have been only the medieval equivalent of minor gentry in terms of their social status. It is therefore possible that the *briefes of dissasine and mortancestry* were bringing to bear at this level of society the norms and customs already established amongst the higher echelons.

A final consequence of the introduction of the *briefes of dissasine and mortancestry* may have been the formulation, or perhaps refocusing, of the *briefe of right* and the establishment of the important rule that no-one could be made to answer for the lands he held save through an action raised by royal *briefe*. As already mentioned,¹²¹ in the twelfth century the king had enforced his peace and protection by commands to do right. We also know from evidence after the reign of Alexander II that alongside the *briefes of dissasine and mortancestry* there was later a *briefe de recto*—of right—also used for the recovery of lands in dispute.¹²² Most probably this *briefe* developed its specific characteristics after *dissasine* and *mortancestry* had carved out their respective niches in the protection of *sasine* and inheritance. This development left a number of problem areas untouched, and it seems clear that in the later medieval law the *briefe of right* came to perform a residual or “sweeper” function in cases about land. The insistence from 1230 that *dissasines* had to be carried out justly and by judgement may well have led lords and other claimants unable to use *mortancestry* but seeking to

¹²¹ See above, 000.

oust sitting tenants to take action themselves by royal *briefe*. From the 1230s on, there are a number of cases in which actions about land were raised in lords' courts but by means of the king's *briefe*.¹²³ The evidence is too thin to allow firm conclusions to be drawn; but these *briefes* may well have been royal orders addressed to the court commanding that right be done. And if proceedings like this became at all common, then it can only have been a short step to the rule, long established in the English common law, that an action over a claim to land could only be commenced with a royal command.¹²⁴ At that point, whenever it occurred (and it must have been before 1270, when we have our first statement of this rule), royal justice had laid claim to an exclusive power to deal with certain types of dispute. Further, another weapon had been created with which the Church's claims to jurisdiction could be fought off. A major step had been taken towards the creation of a Scottish secular common law.

In sum, therefore, while during the reign of Alexander II royal justice clearly built on foundations already laid in the course of the twelfth century, it also became more articulate and systematic, and began to assert much more strongly not just ultimate, but also exclusive jurisdiction within the realm in relation to secular land. The claims of the ecclesiastical courts were resisted and circumscribed, and the courts of local lords were subjected to more intensive supervision and scrutiny. A key instrument in this process was the royal *briefe*, by the increasingly standardised forms of which the claims of royal justice were made apparent in both secular and ecclesiastical fora. A greater awareness of the existence and significance of an independent legal system is apparent too in the writing down, at the very end of the reign in 1249, of the hitherto customary Laws of the

¹²² See MacQueen, *CLFS*, 188-210.

¹²³ MacQueen, *CLFS*, 193-4.

¹²⁴ *Ibid*, 105-11.

Marches,¹²⁵ “another aspect of the sharpening recognition on each side of the Border that to allow the king’s subjects to be treated under the law of another kingdom would be in prejudice of royal authority and national identity”.¹²⁶

But it would be wrong to see the legal developments of this period purely as a reaction to the presence of competing authorities such as the Church and the king of England. In particular, the Church can be seen to have provided an impetus for change quite apart from the breadth of its jurisdictional claims. As the guardian of the spiritual and moral health of Christendom, it brought a wholly different kind of pressure to bear upon secular law and custom, a pressure which seems to have borne fruit in Scotland. The most obvious example discussed or mentioned in this paper is the success of the ecclesiastical attack upon the *judicium Dei*, and the deployment in its place of the inquest or jury. But many other instances can be given. The fundamental concept of default of justice as a means of expanding royal jurisdiction was transplanted from the canon law. Criminal law, and in particular the gradations of homicide, seems to be informed by the moral perceptions of the Church, as does the desire, already evident in the twelfth century, to repress the settlement of feud by private settlement rather than by just punishment. The canon law of marriage, legitimacy and status not only challenged the lax customs of the laity but came to lie at the heart of the secular rules about the inheritance of land. We may also suspect that it was the Church which was the most important influence in establishing the right of women to inherit despite much contrary social practice. In this way the development of Scots law was exposed to the influence of wider patterns of development in Europe. At the same time it drew inspiration from the rising common law of England, while retaining much from a past that stretched back

¹²⁵ *APS*, i, 413-6, translated with commentary by G Neilson, in *Stair Society, Miscellany One* (Edinburgh, 1970), 11-77.

beyond the twelfth century. In 1254, five years after the death of King Alexander, Pope Innocent IV issued the bull *Dolentes*, identifying Scotland as a land where the affairs of the laity were governed by lay customs and those of the church by the canons of the holy fathers.¹²⁷ Understandably the Pope did not dwell on the interplay just observed between the lay customs and the canon law, but it was already, and would continue to be, a vital ingredient in the emergence of a distinctive common law of Scotland.

¹²⁶ MacQueen, “*Regiam Majestatem*”, 10. See further on the *Leges Marchiarum* of 1249, W W Scott, “The March Laws reconsidered”, in Grant and Stringer (eds), *Medieval Scotland*.

¹²⁷ The text of the bull is to be found in Matthew Paris, *Chronica Majora*, ed H R Luard (Rolls Series, London, 1872-83), vi, 295.